John Neilson of *Chappel*,
AND
James Lanrick of *Lady-lands*, } Appellts;

John Murray, eldeſt Son of *Elizabeth Maxwell*, by *Gilbert Murray*, her firſt Husband, deceaſed,
John M'jore,
AND
James Frazer, } His Truſtees, } Reſpdts.

The APPELLANTS CASE.

1655. THE Lands of *Conheath* and *Lady-lands*, and other Lands in *Scotland*, of the yearly Value of 111 *l. Sterling*, belonged originally to *Alexander Maxwell* of *Conheath* (who died *Anno* 1655) but were charged with ſeveral Debts; for which ſeveral of the Creditors obtained Decrees of Apprizing (*i. e.*) Decrees appropriating the Eſtate to the Creditors, in Satisfaction of their Debts, under an Equity of Redemption, during the Currency of Ten Years; but the Debts not having been ſatisfied within that Time, the Equity of Redemption came to be forecloſed, and theſe Apprizings became Titles of Property to the Creditors.

1669. *Elizabeth Maxwell*, one of the Daughters of the ſaid *Alexander Maxwell*, did firſt intermarry with *Gilbert Murray*, by whom ſhe had two Children, the Reſpondent *John Murray*, and *James Murray*.

1675. Several of the Apprizings upon the ſaid Eſtate came by meſne Conveyances into the Per-
1677. ſon of *Maxwell* of *Carnſalloch*, who made them over to one *Maxwell* of *Park*, who aſſigned them in ſo far as might extend to one half of the Eſtate, to the ſaid *Elizabeth Maxwell*, by which the Property to that half of the Eſtate was veſted in her——but ſhe did not, by any Deed, make it over to her ſaid Husband, or Children.

1688. July 24. After *Gilbert Murray*'s Death, the ſaid *Elizabeth Maxwell* intermarried with *Gilbert Maccartney*; and, in their Marriage-Settlement, ſhe diſpos'd her Half of the Lands of *Conheath* to *Gilbert Maccartney*, her promiſed Husband, in conjunct Infeftment and Liferent with herſelf and longeſt Liver of them two, and the Heirs to be procreate betwixt them; which failing—— *N. B.* The Limitation goes no further, but here remains a Blank in the Deed never fill'd up.

1695. *Gilbert Maccartney*, the ſecond Husband, dy'd, leaving ſeveral Children by the ſaid *Elizabeth Maxwell*, who is ſtill alive; ſo that, according to the ſaid Settlement, the Eſtate, after her ſaid ſecond Husband's Death, remained to her as the longeſt Liver, and ſhe made over her Right, in Truſt for her own Uſe, to *James Murray*, her ſecond Son.

1702. The Reſpondent, *John Murray*, brought his Action before the Court of Seſſion in *Scotland*, againſt the ſaid *James Murray* the Truſtee, to ſet aſide the Title of *Elizabeth Maxwell* his Mother, pretending, that, by the Conveyance of *Maxwell* of *Carnſalloch*, the Property of the Eſtate was not in *Elizabeth* the Wife, but in *Gilbert Murray* her firſt Husband; and that the Eſtate did deſcend to him the Reſpondent, as Heir to the ſaid *Gilbert* his Father; in which Suit *Elizabeth*, the Mother, appeared as a Party, and the
1713. Court of Seſſion decreed, that the Property of the Eſtate belonged to the Mother, and not
1715. to the Father, and abſolved the ſaid *James Murray* and *Elizabeth* from the Suit: *Which Judgment, upon an Appeal, was affirmed by the Moſt Honourable Houſe of Lords.*

1714. and 1716. After this, *the Appellants purchaſed* the Eſtate from *Elizabeth Maxwell*, with Conſent of the ſaid *James Murray*, for an adequate Price, and valuable Conſideration, *i. e. John Lanrick*, Father of the Appellant *James Lanrick*, purchaſed the Lands of *Lady-lands*, and the Appellant, *John Neilſon*, the Lands of *Conheath*, *and entered upon the Poſſeſſion, which they ſtill continue.*

And, to confirm their Titles, they afterwards purchaſed the Right of *William Maccartney*, eldeſt Son of the ſaid *Gilbert Maccartney* by the ſaid *Elizabeth Maxwell.*

1717. The *Reſpondent this Year turn'd Proteſtant*, and then ſet up a Pretence, that he was next Proteſtant Heir to *Alexander Maxwell*, his Grandfather by the Mother, and brought an Action againſt the Appellants, the Purchaſers, wherein he inſiſted *a ſecond time* to ſet aſide his Mother's Titles, and the Conveyance from her to the Appellants; but he was likewiſe over-ruled by ſeveral Decrees of the Court of Seſſions, as to this Claim, his Grandfather having been long before diveſted, and the Titles legally eſtabliſhed in the Perſon of the ſaid *Elizabeth.*

Altho' this ſecond Suit was brought ſolely upon the Title of neareſt Proteſtant Heir to the Grandfather, yet the Reſpondent, finding he was not able to maintain his Action upon

on that Title, was pleaſed, without bringing any new Suit, as he ought to have done, to ſet up *a third Claim*, but upon an equally groundleſs Foundation.

1728. He inſiſted, that, by the Marriage-Settlement betwixt the ſaid *Elizabeth Maxwell* and her ſecond Husband, *Gilbert Maccartney*, the Fee of the ſaid Eſtate was veſted in the ſaid *Gilbert Maccartney*, and that ſhe had only an Eſtate for Life, and that, on his Death, the Fee might have deſcended to the Heirs of that Marriage, but that they, being all Popiſh, were incapable of inheriting; and that therefore the Right of Succeſſion to the ſaid Eſtate devolved upon *Agnes Maccartney*, one of the Children of the ſaid *Gilbert Maccartney*, by a former Wife, and that ſhe had been ſerved neareſt Proteſtant Heir; and that the Reſpondent, *John Murray*, having obtained a Conveyance from her, was entitled to claim the ſaid Eſtate, under her Right.

To this the Appellants anſwered, That *Agnes Maccartney* not being the Iſſue of her Father's ſecond Marriage, could have no Pretence to the Eſtate in Queſtion, under the Articles made upon that Marriage, or, if ſhe had, ſhe was not *ſerved Heir of Proviſion* to her Father, and that ſhe was Popiſhly educated, and had never taken the *Formula* preſcribed by Law, and died before Commencement of the Suit.

1728. July 20. The Court of Seſſions, by Interloquitor of this Date, found, that the general Service is a good Title, the Purſuer (*i. e.* Reſpondent) proving, that the Children of *Gilbert Maccartney*'s ſecond Marriage were reputed Papiſts, and bred in Popiſh Families.

1st Interloquitor appealed againſt.

1728-9. Jan. 23. And by another Interloquitor, of this Date, adhered to the laſt Interloquitor.

2d Interloquitor appealed againſt.

Thereafter the Appellants complained, by Petition, againſt the above Interloquitors, and pray'd a Review; for that the Condition upon which *Elizabeth Maxwell* diſpon'd her Eſtate, as above, to her ſecond Husband Mr. *Maccartney*, was never performed by him; ſo that his Heirs, even of that Marriage could not claim the Eſtate. But,

1728-9. Feb. 18. The Court of Seſſions, by another Interloquitor of this Date, repell'd the Objection, that the onerous Cauſe of the Lands being diſponed by the ſaid *Elizabeth Maxwell* was a Jointure ſhe never enjoyed——And found, that *Maccartney*, the Husband, was Fiar.

3d Interloquitor appealed againſt.

1728-9. Feb. 22. And, by another Interloquitor of this Date, found, that the Appellant *Neilſon*'s Charter proceeding both on the Conveyance from *Maxwell* of *Park*, and a Right from *William Maccartney*, Son to *Gilbert Maccartney*, of the Benefit of his Father's Contract of Marriage, That he was in the Knowledge of *Elizabeth Maxwell*'s Right and Conveyance thereof to her Husband *Maccartney*, and that the Appellant, *Neilſon*, could not claim the Benefit of the Conveyance from *Maxwell* of *Park*, to the Prejudice of *Gilbert Maccartney*'s Right, and therefore refuſed the Deſire of the Bill.

4th Interloquitor appealed againſt.

Eliz. Maxwell's Diſpoſition *Oct.* 13. 1716. and *Maccartney*'s not till *Nov.* 1717.

From theſe four Interloquitors the Appellants have brought their Appeal, and hope the ſame ſhall be reverſed.

Reaſons for reverſing.

1. For that the Appellants were Purchaſers for a valuable Conſideration, from *Elizabeth Maxwell*, the Mother, in whom the Court of Seſſion, and *the moſt Honourable Houſe of Lords had found the Property* of the Eſtate was lodged, and that they were not bound to take Notice of any latent Claim which *Gilbert Maccartney*, the ſecond Husband, might have had, no ſuch Claim having been ſet up before their Purchaſe.

2. By the Marriage-Settlement, the Eſtate being diſpon'd to *Gilbert Maccartney*, in conjunct Infeftment and Life-rent with *Elizabeth* herſelf, and longeſt Liver of them two, and *Elizabeth* having ſurvived her Husband, the Fee remained in her *who is yet alive*, and that if ſhe had not ſold the Eſtate to the Appellants, which ſhe might lawfully do, the ſame muſt have deſcended to the Heir of the Marriage betwixt them, not as Heir of Proviſion to their Father, but as Heir of Proviſion to their Mother.

3. The Marriage-Contract was a perſonal Covenant from *Elizabeth* the Wife, to ſurrender the Eſtate in Favour of her Husband for his Life, if he had ſurvived, and failing of him, to the Heirs of the Marriage, and went no further; ſo that *Gilbert* the Husband being dead, and the Heirs of the Marriage ſaid to be incapable of taking the Eſtate, becauſe of their being Popiſh, there is no Perſon exiſting who can claim Performance of the Mother's Covenant, and therefore the Eſtate remained with herſelf.

4. Suppoſing the Eſtate, by the Marriage-Contract, had been limited to *Gilbert Maccartney*'s Heir of his firſt Marriage, upon the Failure or Incapacity of the Children of his Second Marriage, yet *Agnes Maccartney*, his Daughter by his firſt Marriage, could not carry a Right to that Eſtate by a general Service, as Heir of Line to her Father, but muſt have been ſerved (and cognoſced) Heir of Proviſion, in Vertue of the Marriage-Settlement; in which Service either the Death or Incapacity of the Children of the Second Marriage muſt have been proved, and the Marriage-Contract it ſelf muſt have been given in Evidence to the Inqueſt; and it muſt have been prov'd, that ſhe was neareſt Heir of Proviſion, or by Will, in Vertue of that Settlement; nothing of all which was done; and therefore, her Service, as Heir in general of Line to her Father, could not be available, ſo as to carry the Right to this Eſtate; and ſhe having made up no other Title, and never having been ſerved Heir of Proviſion, even to her Father, the Eſtate could not be veſted in her, and, of Conſequence, the Conveyance from her to the Reſpondent *John Murray* is void in Law.

5. *Agnes Maccartney* was herſelf born of Popiſh Parents, and educated by them, and never having taken the *Formula* required by the Law of *Scotland*, ſhe herſelf was incapable to ſerve Heir, or ſucceed to any Land Eſtate; and no Title derived from her, *eſpecially*

ally a voluntary Conveyance, could be good for any thing, much leſs in a Queſtion with a Proteſtant Purchaſer *for a valuable Conſideration.*

The Appellants, in Support of their Purchaſes, did likewiſe inſiſt upon two ſeparate Titles acquired by them to the Eſtate in Queſtion, independent of the Titles of the ſaid *Elizabeth Maxwell*, or *Gilbert Maccartney*; which ſtand thus, *viz.*

1ſt Separate Title. *Alexander Maxwell*, the original Proprietor, became bound, as Principal, with *Maxwell* of *Killbean*, and *Maxwell* of *Killielung*, as Sureties for him, in a Bond, to *Clark*, for 2000 Marks *Scotch*; upon which *Killbean* was ſued, and his Eſtate apprized, by the Executors of *Clark*, the Creditor, for one Half of the principal *Annual* Rents and Penalty, and a Sum, by Way of Coſts, called Sheriff-Fee, claimable, by the Law of *Scotland*, by the Officer who ſeizes the Lands in Execution.

Whereupon *Killbean*'s Son paid the Debt, and took an Aſſignment thereof, in order to have his Recourſe againſt the principal Debtor, and, upon that Aſſignment, adjudged the Lands in Queſtion from the ſaid *Alexander Maxwell*; which Adjudication was, by meſne Aſſignments, conveyed to the Appellants—— and they inſiſted, that the Equity of the Redemption of this Adjudication being now forecloſed, they have, thereby, a Right of Property to the Eſtate, excluſive of any Title in the Reſpondents.

The Reſpondents objected, That this Adjudication was void—— 1. For that the Will of *Clark*, the Father, was not produced in Judgment, to ſhew that *Clark*, the Son, was his Executor——— 2. For that *Killbean*'s Son had adjudged the Principal's Eſtate for the Sheriff-Fee, that had been levied of him, which the principal Debtor was not bound to pay.

The Appellants reply'd, that *Clark*'s Will was produced in the Apprizing againſt *Killbean*, which was afterwards aſſigned to his Son; and that there was no Occaſion to produce it in the Second Adjudication, unleſs it had been called for; and it was now again produced; ſo that the Proceedings were legal, and the Titles entirely good, in the Perſons of the then Claimants.

And as to the Sheriff-Fees levied upon *Killbean*, it was a Damage that aroſe from Default of the Principal, in not releaſing his Surety, who therefore had a Right to claim it in the Adjudication againſt the Principal's Eſtate.

2d Separate Title. *Alexander Maxwell*, by his Marriage-Settlement, provided his Wife to a Life-rent of 50 *l. per Annum*, to be iſſuing out of Part of his Lands of *Conheath*, which he warranted to be worth 50 *l. per Annum.*

After his Death, his Widow intermarried with *Maxwell* of *Miltoun*, and the Lands on which the ſaid 50 *l. per Annum* was ſecured, having amounted only to 37 *l.* 1 *s.* 8 *d.* brought his Suit for the Arrears againſt the Heirs of *Alexander Maxwell*, and recovered Judgment, upon which he obtained an Apprizing upon the Eſtate, the Equity of Redemption of which Apprizing is alſo forecloſed, and the Right thereto is now in the Appellants.

The Reſpondent objected, That the Apprizing was void, for that the Extent of the Rent of the Lands was not proved in the Court of Seſſion, by which the Extent of the Arrears might appear.

The Appellants anſwered, That the then Plaintiff ſet forth in his Summons the Extent of the Rent, and Extent of the Arrears, and referred for the Truth thereof to the then Defendants Oath, who not denying the ſame, were, according to the Forms in *Scotland*, concluded, and Judgment was accordingly given, and muſt ſtand good, unleſs the Reſpondent could prove, that the Rent of the Lands at that time were more than what was ſet forth in the then Plaintiff's Summons, which was not pretended to be done.

1730. July 28. 5th Interloquitor appealed againſt. The Court of Seſſion, by their Interloquitor of this Date, found, that the Adjudication deduced at *Maxwell* of *Killbean*'s Inſtance, was totally null, and reſtricted *Maxwell* of *Miltoun*'s Apprizing to a Security for principal Sum and Annual-rents.

Nov. 24. 6th Interloquitor appealed againſt. Upon a Petition for the Appellants praying a Review of the above Interloquitor, as to *Maxwell* of *Killbean*'s Adjudication, the Court, by another Interloquitor of this Date, adhered to the former Interloquitor.

After this, the Reſpondents preſented a Petition to the Court, praying their Lordſhips to find, that *Miltoun*'s Apprizing ought not to ſubſiſt as a Security, nor be good for any thing at all.

1730-1. Feb. 5. 7th Interloquitor appealed againſt. The Court, by Interloquitor of this Date, ordained the Appellants to produce the Grounds of *Miltoun*'s Apprizing, as alſo of the Decreet of Conſtitution.

Againſt theſe three laſt Interloquitors alſo the Appellants have appealed, and for the Reaſons above ſet forth, and others to be offered at Hearing, the Appellants humbly hope all the ſaid ſeven Interloquitors ſhall be reverſed, and that your Lordſhips will make ſuch other Order for the Appellants Relief, as to your Lordſhips ſhall ſeem meet.

P. YORKE.
DUN. FORBES.
R. DUNDASS.
CH. ARESKIN.

John Neilson, Esq; & *al.* Appell^ts.

AND

John Murray, & *al.* Resp^dts.

The APPELLANTS CASE.

To be heard at the Bar of the House of Lords on *Monday* the 13th Day of *March* 1731-2.